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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERTA JEAN KILLINGBOCK et al.,

Plaintiffs and Appellants,

v.

LOMA LINDA UNIVERSITY et al.,

Defendants and Respondents.

2d Civil No. B210578
(Super. Ct. No. 1247019)
(Santa Barbara County)

Appellants Roberta Jean Killingbock,¹ and Lois Fadale are the widows of Jack Killingbock and Louis Fadale. Appellants appeal from a judgment of dismissal after an order sustaining a demurrer without leave to amend. They claim they are beneficiaries of an assignment, executed in 1966, granting their husbands an interest in an oil field in Santa Barbara County. They assert that respondents Loma Linda University (LLU) and a former well operator, now deceased (Devine), engaged in wrongful conduct which caused them to lose their investments. Appellants seek to recover the market value of 500,000 barrels of crude oil from LLU and the widow and family trust of the well operator. We reverse in part and remand.

¹ Appellant notes that she has been erroneously named in the action as Killingbock and her correct surname is "Killingbeck." We used Killingbock because the misspelled name has been used throughout the litigation and on appeal.

FACTS

On April 14, 2008, appellants filed their fourth amended complaint against respondents LLU, as trustee for the Van der Aarde Trust and against Doris Devine, individually, and as trustee of the Devine Family Trust (Devine). Appellants alleged causes of action for breach of warranty, rescission of contract, fraud, negligent misrepresentation, declaratory relief and securities fraud.

Appellants claimed an interest in oil rights under an assignment executed in 1966. The oil rights arose under the Magenheimer Lease (lease), consisting of approximately 800 acres in the Cat Canyon oil field in northern Santa Barbara County. Appellants contended they have rights to the market value of the unextracted oil, pursuant to the 1966 assignment. They also alleged that a well operator, Devine, engaged in wrongful conduct, entitling them to financial compensation.

Assignment to LLU

On September 14, 1966, W.C. Van der Aarde, an individual, was assigned an interest in "crude oil reserves " under the lease. On September 15, Van der Aarde assigned his interest in the lease to LLU, which was active in the research, advisement and purchase of oil and gas interests in California. LLU also served as trustee of the W.C. Van der Aarde Revocable Trust (trust).

Assignment from LLU to Killingbock to Fadale

In their complaint, appellants alleged that LLU assigned 500,000 barrels of crude oil reserves to Jack D. Killingbock doing business as Jack D. Killingbock Electric on September 30, 1966. In 1979, Killingbock assigned one-half of his interest (250,000 barrels of crude oil reserves) to Louis Fadale. The written assignments are attached to the pleading. The LLU/Killingbock assignment is signed by both parties. However, the Killingbock/Fadale assignment is incomplete and does not include a signature page. Neither document was recorded. The trial court took judicial notice of recorded copies of

lease assignments between other entities, dating from 1984 to 1995, which reflect the present assignment of the lease to B.E. Conway Energy, Inc. (Conway).²

On November 28, 2006, appellants offered to sell their assignments to Conway. Conway rejected their offer, indicating that it had exclusive rights to remove all the crude oil under the lease. Appellants alleged that neither Conway, LLU, nor any prior operators or royalty owners had communicated with appellants or their husbands regarding production on their lease. Appellants contend they were not obligated to assert their rights or take any affirmative steps to preserve their alleged interest. Rather, they viewed it as a long term investment which could be sold sometime in the future.

Allegations Against LLU

Appellants alleged causes of action against LLU for breach of warranty, recession of contract, fraud, negligent misrepresentation and securities fraud (first through fourth and sixth causes of action). They alleged that LLU intended that Killingbock rely on its representation that it had "marketable title to 500,000 barrels of crude oil," and the right to make an assignment. Killingbock purchased the assignment in reliance on this representation. Appellants alleged that LLU had falsely represented to Killingbock that Van der Aarde had assigned it an interest in the lease, and that Van der Aarde had never authorized LLU to assign assets from his trust. Appellants alleged that LLU knew that it did not have clear title to the reserves, but "withheld these facts" from Killingbock.

Allegations Against Devine

Ray Devine was the operator of the lease from 1965 to 1967. He and his wife, Doris Devine, had a 100 percent working interest during that time. Devine commissioned the drilling and development of wells under the lease. As was custom and practice in the industry, Devine transferred the future production of oil from the lease in

² The record includes various assignments of portions of the lease: a 1984 assignment from Chevron U.S.A. Inc. to Petrominerals Corporation, and a 1995 assignment from Petrominerals to B.E. Conway Energy, Inc. All are signed and recorded.

exchange for "valuable consideration from [appellants'] predecessors in interest." In the early 1970's, Devine sold his working interest, but retained a royalty interest for himself and his wife.

Appellants alleged a fifth cause of action for declaratory relief against Devine. They requested a judicial determination as to Devine's "rights and obligation[s] to provide crude oil . . . under the Assignment." In a sixth cause for securities fraud, appellants alleged that both LLU and Devine sold assignments without first obtaining a permit from the Department of Corporations. Elsewhere in the complaint, appellants made the general allegation that Devine sold assignments to two individuals who were later indicted for securities fraud for selling oil interests without a permit.

Appellants sought (1) a judicial declaration that they have an interest in 500,000 barrels of crude oil under the lease; (2) damages against LLU and/or Devine equivalent to the market value of 500,000 barrels of crude oil, at a value exceeding \$25 million; and (3) imposition of a constructive trust against LLU and/or Devine "on the property given as consideration" by Killingbock for the assignment.

Demurrers

LLU demurred on the grounds that the fourth amended complaint was barred by the statute of limitations because the cause of action had accrued 40 years earlier. It cited authority that oil cannot be owned in place, but only after it has been extracted from the ground, and that appellants had failed to record their interests.

Devine demurred on the grounds that the complaint was barred by the statute of limitations and that appellants had failed to allege the existence of a contractual relationship between Devine and LLU or that Devine had engaged in any wrongful conduct. In an attachment to its minute order, the trial court stated that "there is just no way around the statute of limitations issue in this case [¶] The Court has looked at the issue of inquiry, notice, etc., and has tried to provide great leeway to the plaintiff. At some point in time, the plaintiff had an obligation to inquire into that area and did not do so." The court ruled that the fourth amended complaint was barred by the statute of

limitations. It sustained the demurrer without leave to amend, and dismissed the matter with prejudice.

DISCUSSION

On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we review the trial court's ruling de novo, exercising our independent judgment to determine whether the complaint states a cause of action under any legal theory. (*Ochs v. Pacificare of California* (2004) 115 Cal.App.4th 782, 788.) We accept as true the properly pleaded allegations of facts in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If no liability exists as a matter of law, we must affirm the sustaining of the demurrer. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.) If there is a reasonable possibility that the defect can be cured by amendment the trial court has abused its discretion and we reverse. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

The statute of limitations does not bar prosecution of this lawsuit. Under Code of Civil Procedure, section 337, a cause of action upon a written contract must be brought within four years. However, the statute of limitations is tolled when an action is brought for rescission of a contract, on the grounds of fraud or mistake. Under those circumstances, the time does not begin to run until the aggrieved party discovers the facts constituting the fraud or mistake. (*Id.*, subd. (3).) The issues of duty, discovery and inquiry notice cannot be decided on demurrer. They are determinations of fact to be made in the process of a trial.

Appellants have successfully alleged the existence of a written contract and that LLU engaged in fraudulent conduct. Fraud is defined as (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) Appellants alleged that LLU, knowing that Van der Aarde had not assigned it an interest in the lease, nevertheless represented to Killingbock that it had an interest in 500,000 barrels of crude oil reserves.

Killingbock relied to his detriment on LLU's representations and purchased the assignment. Appellants alleged they have been damaged in a dollar amount equivalent to the market value of 500,000 barrels of crude oil.

As to application of the delayed discovery doctrine, appellants alleged that they were not obligated to investigate the validity of their assignments, and did not discover any deficiency until 2006, when they attempted to sell their interests to Conway. Appellants have successfully alleged causes of action against LLU based on rescission and fraud. They may proceed to trial to litigate the facts upon which the application of the delayed discovery doctrine depends. (Code. Civ. Proc., § 337, subd. (3).)

In regard to Devine, appellants alleged that he was involved in an assignment to LLU and that he sold an assignment in the 1960's to raise capital to drill wells. Appellants, apparently to establish a connection between Devine and Van der Aarde, alleged that they knew each other because Van der Aarde's brother was Devine's neighbor. No facts explaining the import of the relationship were alleged.

Appellants' allegations against Devine do not identify any specific instances of misconduct or establish that he had a connection with LLU. In their fifth cause of action for declaratory relief, appellants seek a judicial determination whether Devine is obligated to provide them with an interest in Devine's crude oil reserves. As appellants alleged above, Devine has retained a royalty interest in the lease. There is no allegation why appellants might be owed such an interest, or that they should somehow share in Devine's royalty interest. In the sixth cause of action for securities fraud, appellants alleged that Devine sold securities without a permit, but did not identify the nature of the transactions, when they occurred or the identity of the parties involved.

Appellants first named Devine as a defendant in the second amended complaint, making specific factual allegations concerning his responsibilities as a well operator. However, after three attempts, they have failed to allege with specificity the wrongful acts that Devine committed. There is no reasonable probability that the allegations against Devine can be successfully amended to state a cause of action. The trial court correctly sustained Devine's demurrer without leave to amend and dismissed

the complaint as to Devine. We conclude, however, that it was error to sustain LLU's demurrer without leave to amend as to the first through fourth and sixth causes of action of the fourth amended complaint on the ground that it was barred by the statute of limitations.

DISPOSITION

The judgment (order of dismissal) is reversed as to respondent LLU. LLU shall have 30 days after remand in which to respond to the first through fourth and sixth causes of action alleged against LLU in the fourth amended complaint. The judgment (order of dismissal) in favor of Devine is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Timothy J. Staffel, Judge
Superior Court County of Santa Barbara

Frear Stephen Schmid, J. Curtis Edmondson, for Plaintiffs and Appellants,
Roberta Jean Killingbock and Lois Fadale.

Clayson, Mann, Yaeger & Hansen, Roland C. Bainer for Defendant and
Respondent Loma Linda University.

Law Offices of David A. Wankel, David A. Wankel, for Defendant and
Respondent, Doris A. Devine and the Devine Family Trust.